PROCEDURAL PROBLEMS OF A MOTION TO SUPPRESS EVIDENCE IN A FEDERAL CRIMINAL CASE

Rule 41(e) of the Federal Rules of Criminal Procedure[1] provides for a motion to suppress the use at trial of property illegally seized and to secure its return. Because the United States Supreme Court is constantly enlarging this umbrella of constitutional protection afforded those accused of crime, there is little doubt that Rule 41(e) will be a more widely used weapon in the arsenal of the criminal defense attorney. It is the purpose of this comment to explore certain procedural problems of the Rule 41(e) motion and to suggest one possible procedure as a solution.

Rule 41 has not been amended since 1949, and at present Congress has provided no detailed procedure for the presentation and disposition of the motion to suppress evidence. Although the Rules so provide,[2] no district court has undertaken to develop such a procedure. And, even though the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has considered extensive revision of the Rules, much of which has been adopted recently by the Supreme Court, there has been no such treatment of Rule 41.[3] Consequently, the primary judicial statement on suppression procedure is found in those few federal cases in which the trial judge was confronted with the problem.[4]

The primary concern of this comment is the use of supporting affidavits to decide the issue of suppression of evidence before trial. This will demand (1) an indication of the collateral issues with which the court must be concerned in establishing any uniform procedure for motions to suppress evidence; (2) an investigation of the federal cases which have been concerned with this procedure; and (3) a proposal of a suitable procedure for the Federal District Courts.

I

Before approaching the decided cases two preliminary issues should be considered. The first concerns the burden of going forward with the evidence and the burden of proof when the accused submits his motion to suppress evidence. Generally, as with any motion, the burden of going

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[1] Hereafter referred to as the Rules.

[2] Rule 57(a): "Rules made by district courts and courts of appeals shall not be inconsistent with these rules." See Fischer & Willis, FEDERAL LOCAL COURT RULES (1964): N.J. p. 9 (D.N.J. Rule 21); Pa. p. 55 (W.D.Pa. Rule 23, that the motion must state the grounds justifying relief); Wash. p. 22 (W.D. Wash. Rule 9, that the motion will be supported by an affidavit if facts not in the record are relied upon, and that the hearing is discretionary).

[3] See Preliminary Drafts of Proposed Amendments to Rules of Criminal Procedure, 31 F.R.D. 665 (1962) and 34 F.R.D. 411 (1964). Proposed changes adopted, 39 F.R.D. 69, 252 (1966).

[4] See Rule 57(b): "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

forward and the burden of proof are upon the accused as the moving party;[5] however, the ultimate resolution of this issue actually depends upon the manner in which the evidence was obtained. For example, if the search and seizure was incident to a regularly issued warrant, valid on its face, then the accused must prove lack of probable cause[6] or unreasonable execution of the warrant.[7] If the accused proves that the search and seizure was without either an arrest or a search warrant, then the burden shifts to the government to prove the existence of probable cause for the search or for the arrest to which the search was incident.[8] If the government relies not upon a valid arrest to justify the search, but upon the alleged consent of the accused, then the government has the burden to prove consent by "clear and positive evidence."[9] Assuming that the accused successfully challenges the search and seizure, the government, in order to save the evidence, has the burden to prove an independent source.[10]

The second preliminary issue concerns the constitutional boundaries within which any adopted procedure must operate. On the one hand, there is the right guaranteed the accused by the Sixth Amendment to the United States Constitution "to be confronted with the witnesses against him. . . ."[11] The right to meet witnesses face-to-face and to cross-examine them to test the accuracy and credibility of their testimony is fundamental to insure a fair trial.[12] This right must not be needlessly limited during any vital issue of the case, and no one will dispute that a decision

[5] It is beyond the scope of this comment to discuss the quantum of proof which either the accused or the government must produce, once the burden of proof is fixed.

[6] Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962); Batten v. United States, 188 F.2d 75 (5th Cir. 1951).

[7] Woo Lai Chun v. United States, 274 F.2d 708 (9th Cir. 1960).

[8] Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959); United States v. Rivera, 321 F.2d 704 (2d Cir. 1963). See Johnson v. United States, 333 U.S. 10 (1948); Wrightson v. United States, 222 F.2d 556 (D.C. Cir. 1955).

[9] Channel v. United States, 285 F.2d 217, 220 (9th Cir. 1960). See Burke v. United States, 328 F.2d 399 (1st Cir. 1964); Villano v. United States, 310 F.2d 680 (10th Cir. 1962); McDonald v. United States, 307 F.2d 272 (10th Cir. 1962); United States v. Roche, 36 F.R.D. 413 (D. Conn. 1965).

[10] United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962). Likewise, with the claim of illegal wire tap, the burden is on the accused. "The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however, closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree." Nardone v. United States, 308 U.S. 338, 341 (1939). See United States v. Casanova, 213 F.Supp. 654 (S.D.N.Y. 1963); United States v. Weinberg, 108 F.Supp. 567, 569 (D.D.C. 1952).

[11] United States v. Douglas, 155 F.2d 894 (7th Cir. 1946). See Kirby v. United States, 174 U.S. 47 (1899); Alford v. United States, 282 U.S. 687 (1931); Dixon v. United States, 333 F.2d 348 (5th Cir. 1964).

[12] See Pointer v. Texas, 380 U.S. 400 (1965).

on the motion to suppress evidence is one of the most crucial events in a criminal trial. In many cases, a decision to suppress will so hamper the government's case that the prosecution will be at an end without the necessity of a trial on the issue of guilt. So also, a decision not to suppress will often result in the accused pleading guilty and saving the government the expense of even a court trial. Thus, there is abundant reason for affording the accused the opportunity to confront and cross-examine those who testify to facts tending to show the legality of the search and seizure. This Sixth Amendment right must be considered when discussing the possibility of the government's proceeding by means of affidavits alone. The same is true if the court would insist upon disposition of the motion without any hearing from witnesses.

On the other hand, there is the right guaranteed the accused by the Fifth Amendment to the United States Constitution that he shall not "be compelled in any criminal case to be a witness against himself. . . ." This constitutional right must be considered when the court decides whether the government can demand to cross-examine the accused on his affidavit submitted to support the motion to suppress evidence, especially if, in the first instance, the court demanded the affidavit. There is no federal case directly in point holding that the accused waives his privilege against self-incrimination by swearing to the affidavit. *Jeffries v. United States* seems to indicate that there is no waiver.[13] If the court should decide that submission of an affidavit *does* leave the accused vulnerable to cross-examination during the hearing on the motion, then certainly the court is powerless to compel the accused to file an affidavit, under penalty of summary denial for failure to comply. Such a decision would be contrary to the plain meaning of the Fifth Amendment. Nonetheless, the accused would be able still to insist upon his motion to suppress evidence, in order to protect his right under the Fourth Amendment. Thus, the ultimate result of holding a waiver would be to eliminate the use of affidavits.[14]

These introductory points, then, render more meaningful the problems with which the trial judge is confronted in the cases next to be considered.[15]

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[13] Jeffries v. United States, 215 F.2d 225 (9th Cir. 1954).

[14] Query whether this would be contrary to the trend of more liberal criminal discovery and the use of pre-trial conferences. See authorities cited note 3 *supra*.

[15] Another problem should be noted at this point, namely the extent of use in the case-in-chief of the affidavit and other evidence adduced at the hearing on the motion to suppress. Although the risk of use in the trial will materially influence the accused's willingness to submit an affidavit and thereby curtail the court's ability to demand one, ultimate resolution of the problem is beyond the scope of this comment. Briefly, it seems settled that when the accused is successful on his motion, none of the proceedings can be introduced into evidence in the trial. Safarik v. United States, 62 F.2d 892 (8th Cir. 1933); Fowler v. United States, 239 F.2d 93 (10th Cir. 1956); United States v. Taylor, 326 F.2d 277 (4th Cir. 1964). But

II

In 1955, Judge Halbert outlined a procedure to be used when making a motion under Rule 41(e).[16] In *United States v. Warrington*,[17] the defendant moved to suppress the use of evidence and for the return of property on the ground that it was illegally seized without a warrant. The defendant offered his affidavit as evidence and rested. The govern-

see, Walder v. United States, 347 U.S. 62 (1954), in which the Court held the affidavit of the defendant, successful in his motion to suppress, could be used to impeach his testimony at the trial, when he testified on direct examination that he had never in his life possessed narcotics. If the accused is unsuccessful in his motion, the law seems to be that the proceedings can be used in the trial. United States v. Lindsly, 7 F.2d 247 (E.D. La., New Orleans Div. 1925), *rev'd on other grounds*, 12 F.2d 771 (5th Cir. 1926); Heller v. United States, 57 F.2d 627 (7th Cir. 1932), *cert. denied*, 286 U.S. 567 (1932); Fowler v. United States, *supra*. The penalty imposed by such a ruling has been alleviated somewhat by the Supreme Court holding that, when the charge is illegal possession, the accused need not allege in his motion that he owned the property sought to be suppressed. Jones v. United States, 362 U.S. 257 (1960). This rationale should extend protection for the moving party to *any* adverse use by the government of what the accused claims in the hearing on the motion. He must at least claim some connection with the evidence, and if unsuccessful this alone can be very incriminating. When two constitutional rights are given the accused, the court should not proceed in such a manner that one protection will be used only at the expense of the other. Probable cause is often a close question of fact; and, should the accused fail to sustain his burden of proof, he should not be penalized by disclosure at trial, when he was merely exercising a right which is constitutionally his. In federal civil cases, to accept an affidavit as evidence is generally held to be improper. Compare United States ex. rel Karpathiou v. Scholtfeldt, 106 F.2d 928 (7th Cir. 1939); N.L.R.B. v. Rath Packing Co., 123 F.2d 684 (8th Cir. 1941); Prima Products v. F.T.C., 209 F.2d 405 (2d Cir. 1954); United States v. Grant, 286 F.2d 157 (9th Cir. 1961); Automobile Sales Co. v. Bowles, 58 F.Supp. 469 (N.D. Ohio E.D. 1944). But see, United States v. Cook, 17 F.R.D. 412 (S.D. Texas, Houston Div. 1955). In Heller v. United States, *supra*, the court argued that if the defendant had made the statement out of court similar to the contents of his affidavit, such would be admissible through the testimony of those who heard him; however, the fallacy lies in the fact that the accused would make no such statement, except that he wishes to challenge the search and seizure, as is his right under Rule 41(e).

[16] Rule 41(e):

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that [then listing several causes]. *The judge shall receive evidence on any issue of fact necessary to the decision of the motion.* . . . The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing. [Emphasis added]

Rule 47:

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. *It may be supported by affidavit.* [Emphasis added]

Rule 12(b) (4):

A motion before trial raising defenses or objection shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by jury if a jury trial is required under the Constitution or an act of Congress. *All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.* [Emphasis added]

[17] 17 F.R.D. 25 (N.D. Cal. N.D. 1955).

ment objected to such admission and demanded to cross-examine the defendant on his affidavit. Both sides to the disputed question maintained their respective positions on the proper procedure to be followed, and Judge Halbert filed the memorandum to provide a guide for the next hearing. He held that the phrase "shall receive evidence on any issue of fact" in Rule 41(e) imposes a mandate on the trial court to hear competent testimony on any disputed issue of fact. Therefore, submission of affidavits is proper only if the issue is one of law, on an agreed statement of facts.[18] In this manner, Rule 47 and Rule 12(b)(4) amplify Rule 41(e).[19]

Moreover, since the defendant is the moving party, he has the burden to go forward with the evidence. When, as in the *Warrington* case, the defendant challenges the search without a warrant, he must "make a prima facie showing before the Government is required to affirmatively defend the acts of its officers."[20] The officers are presumed to be acting legally. In the *Warrington* case, the burden of proof was on the government to justify the search without a warrant; however, as discussed in Part I, the ultimate burden of proof may be on the accused depending on the particular claim of illegality.

Judge Halbert next considered the problem of the affidavit filed by the defendant as evidence. He concludes that an affidavit is not evidence. To carry his burden of establishing a prima facie case, the defendant must proceed with competent evidence, subject to cross-examination by the government. Rule 47[21] is permissive and discretionary with the court, and must yield to the specific command of Rule 41(e)[22] to hear evidence when there is a disputed question of fact. Note that this is especially true when the ultimate burden of proof will be on the accused. Thus, Judge Halbert ruled that admission of the affidavit was improper and granted the government's motion to strike it. Since the affidavit is inadmissible, the question of cross-examining the defendant was solved:

> The Government may cross-examine the defendant only if he voluntarily submits himself as a witness in the proceedings. With the affidavit stricken, the Government may not use that as a basis for cross-examination of the defendant, so the choice is with the defendant whether he will be a witness and be subjected to cross-examination. If he becomes a

[18] "Considering Rule 41 in this light, it appears clearly that an affidavit is never mandatory and seldom proper, but with the permission of, or at the request of, the Court, may, in some instances, be quite useful and proper. It would appear quite clearly that when a motion could be determined on a question of law, an affidavit would be helpful and time-saving for the Court." United States v. Warrington, *supra* note 17, at 28.

[19] Rules 41(e), 47, 12 (b) (4), *supra* note 16.

[20] 17 F.R.D. 25, 29 (N.D. Cal. N.D. 1955).

[21] See note 16, *supra*.

[22] *Ibid.*

witness, he can be cross-examined as any other witness. Under no other circumstances will the Government be permitted to cross-examine him.[23]

Judge Halbert concludes the opinion with an outline of the procedure to be observed with Rule 41(e) motions:

1. The motion for return of property and to suppress evidence must be in writing.
2. The motion must set forth the ultimate facts which will be relied upon by the moving party, but should not set forth facts of an evidentiary nature.
3. The motion should not be verified.
4. The motion must be supported by points and authorities.
5. No affidavit may be filed in the proceeding by either the moving party or the Government without the express consent of the Court having been first had and obtained. (An affidavit will always be permitted when either party contends that the proceeding can be determined on a point of law without an issue of fact being involved.)
6. The defendant will be required to support his motion by competent evidence that must make a prima facie showing that his motion has merit.
7. The Government will be given an opportunity to controvert the defendant's evidence given in support of his motion.
8. Both parties will be given all reasonable opportunity to rebut the testimony offered by the other.
9. The defendant may not be cross-examined by the Government unless he voluntarily offers himself as a witness in the proceedings.
10. Under no circumstances may either party digress from the true issues involved in this proceeding, and use it for a "fishing expedition."[24]

The primary concern of these cases is to insure that the accused properly establishes a prima facie case, a showing of facts sufficient to justify relief and to compel the government to controvert or else suffer suppression of the evidence. As will be seen, the controversy is whether this showing should be accomplished by means of affidavits, or by testimony of witnesses, or by a combination of the two.

In *United States v. Okawa,*[25] Judge Tavares agreed with the procedure set out by Judge Halbert but would not say flatly that using an affidavit is improper. (See Judge Halbert's Rule 5.)

> Even if, upon a contested hearing, such an affidavit is not considered "evidence" sufficient to shift the burden of going forward with the evidence of the government, it is at least as useful as a statement of grounds in a motion, and, for aught that a defendant might know in ad-

[23] United States v. Warrington, 17 F.R.D. 25, 30 (N.D. Cal. N.D. 1955). Note that Judge Halbert has stricken the affidavit; so, he had no need to consider the situation where one is used and the government demands to cross-examine the accused on it. However, since he would allow use of an affidavit in evidence only when no issue of fact is disputed, seemingly a demand for cross-examination would never arise. Furthermore, he speaks of the defendant "offering himself as a witness," which would imply taking the witness stand.

[24] *Ibid.*

[25] 26 F.R.D. 384 (D.Hawaii 1961).

> vance when filing his motion, might conceivably be admitted by the government, thereby forming an issue of law upon the agreed facts.[26]

In *United States v. Labovitz*,[27] the court held that the motion must state the basis for relief so that the government will know what it has to confront at the hearing on the motion. (Compare Judge Halbert's Rule 2.) The court further reasoned:

> Rule 41 has no requirements as to affidavits. Rule 47 makes affidavits permissive. It is true that some courts have required affidavits. Cf. U.S. v. Stein, D.C.W.D.N.Y., 53 F. Supp. 911; U.S. v. Vomero, D.C. E.D.N.Y., 6 F.R.D. 275. There is much to be said for this practice, but I can not see the legal justification for it.[28]

The court would be content if the moving party merely stated the ultimate facts upon which he will rely.

In *United States v. Privinzini*,[29] the government took the position that the use of an affidavit was no longer proper under the Rules; however, the court held that, in its discretion, it may demand an affidavit if useful to the resolution of the motion, i.e., to eliminate the need for a factual hearing.[30] In *United States v. Vomero*,[31] the court held that, when the motion to suppress is made on grounds other than that the warrant is deficient on its face, "some evidence of probative value in affidavit form should be presented before the court is required to entertain the motion."[32] If the accused attacks the warrant itself, use of affidavits is permissive only; for the court should be able to resolve the motion by reference to the documents lodged with the court. A motion on any other ground will be denied unless supported by an affidavit. What the New York courts are demanding in these cases is the use of the affidavit where the procedure of Judge Halbert would have the motion itself set out the ultimate facts relied upon for relief. (Compare Judge Halbert's Rule 2.) However, Judge Halbert would not agree that the affidavit should include matters of an evidentiary nature. These New York cases do not require the conclusion that a disputed question of fact can be resolved on the affidavits alone. Quite the contrary, in the *Vomero* case, the court found that the affidavits submitted by the defendant and the government agent "differ widely in their versions of the facts surrounding the entry into

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[26] *Id.* at 386, n.2. See United States v. Mazzio, 162 F.Supp. 935 (D.N.J. 1958).

[27] 20 F.R.D. 3 (D.Mass. 1956).

[28] *Ibid.*

[29] 6 F.R.D. 207 (S.D.N.Y. 1946). See also United States v. Stein, 53 F.Supp. 911 (W.D.N.Y. 1943).

[30] "While a hearing is ordinarily required in such matters, the submission of an affidavit by the defendant in this case may obviate such a hearing. Whether a court will require affidavits in other instances is not before me and must be decided as each situation arises." United States v. Privinzini, 6 F.R.D. 207 (S.D.N.Y. 1946).

[31] 6 F.R.D. 275 (E.D.N.Y. 1946).

[32] *Id.* at 276.

defendant's dwelling. The factual issues will have to be determined after the taking of evidence."[33]

However, in *United States v. Jackson*,[34] the court held that the trial judge can direct the admission of affidavits by both parties; and the accused is in no position to object that the court considered the filed affidavits in deciding the motion to suppress. Citing two earlier New York cases,[35] the court held that it had discretion to direct submission of affidavits. These two cases have been discussed above and do not appear to support the broad ruling of the court in *Jackson*. In so far as this allows the trial judge, in all cases if he wishes, to decide the motion without hearing testimony, it endangers the right of the accused under the Sixth Amendment to be confronted with the witnesses against him.[36] However, the case does not require such a broad and dangerous interpretation. The defendant objected to a search without a warrant. Since the defendant came within 26 U.S.C. §3601 which allows the government a statutory right of inspection as a condition precedent to obtaining a liquor license, the only issue was whether the officers entered during business hours. This could well be settled by affidavit alone, such that there would be no factual dispute which would "have to be determined after the taking of evidence."[37]

In *United States v. Skeeters*,[38] the defendant moved to suppress a confession which was allegedly the result of illegal detention through the combined acts of the federal agents and local police. The disputed facts were submitted on opposing affidavits. Ultimately, the court found in favor of the defendant on the issue of illegal detention and ordered the evidence suppressed. As for the procedure followed, the court said:

> Submission of facts by affidavit is approved procedure in these matters. See U.S. v. Adelman, 2 Cir., 107 F.2d 497; In re Fried, 2 Cir., 161 F.2d 453. Oral examination of affiants often strengthens or weakens the showing initially made by affidavits. Accordingly, the Court always invites cross-examination of affiants. Neither party cared to cross-examine in this case.[39]

From this footnote in the case, it is difficult to understand exactly what Judge Tolin means by "approved procedure in these matters." Clearly,

[33] *Ibid.*

[34] 122 F.Supp. 295 (W.D.N.Y. 1954).

[35] United States v. Privinzini, 6 F.R.D. 207 (S.D.N.Y. 1946) and United States v. Vomero, 6 F.R.D. 275 (E.D.N.Y. 1946).

[36] United States v. Douglas, 155 F.2d 894 (7th Cir. 1946). See Kirby v. United States, 174 U.S. 47 (1899); Alford v. United States, 282 U.S. 687 (1931); Dixon v. United States, 333 F.2d 348 (5th Cir. 1964).

[37] United States v. Vomero, 6 F.R.D. 275, 276 (E.D.N.Y. 1946).

[38] 122 F.Supp. 52 (S.D. Cal. C.D. 1954).

[39] *Id.* at 53, n.l. It is interesting to note that, although the consent of both the defendant and the government would seem to preclude *any need at all*, Judge Tolin felt constrained to discuss procedure.

he places the emphasis on the showing in the affidavit rather than on direct testimony and cross-examination.

Reliance on the two cases cited seems misplaced. In *United States v. Adelman,*[40] the issue was consent to search. The trial judge had "ruled that the issue of consent should *not* be determined upon affidavits and denied the motion without prejudice to renewal upon trial."[41] [Emphasis added.] The appellate court held that it is within the trial court's "discretion to decide that oral testimony was necessary and to leave the decision to the trial judge."[42] At the trial, the only testimony was that of the government, and the defendant did not take the stand. The trial judge could reasonably believe the officers that there was consent. This case does not treat at all the issues of the power of the court, over the objection of either party, to decide the disputed questions of fact and the motion on affidavits alone, or of the right of the government to demand to cross-examine the accused because he has submitted his affidavit.

And in *In re Fried,*[43] "[n]o evidence was heard concerning the confessions, as to which the district judge dismissed the petition on the ground that the court lacked all power, before indictment, to suppress the confessions, no matter how illegally obtained."[44] The real issue before the appellate court, for which the affidavits provided only the factual context, was the propriety of a motion to suppress use of evidence before the grand jury. The court held that suppression could be proper and reversed to have the trial court resolve the disputed facts and rule accordingly.

Both *Adelman* and *Fried* indicate that submission of affidavits by both the accused and the government is a proper method by which to present to the court the respective contentions concerning the facts of the case. However, neither case would support a holding that the court might dispose of the motion on the affidavits alone, over the objection of the accused, unless the issue were one of law only. This seems to be the position of Judge Tolin. Although he emphasizes the showing made in the affidavits, he provides as a matter of course that the submission of affidavits may be followed by oral testimony and cross-examination of the affiants.[45] This procedure of presentation of opposing factual contentions by supporting affidavits is not entirely in accord with Judge Halbert's outline. (See Judge Halbert's Rule 5.) However, it is not without foundation in the Rules: Rule 47 permits the supporting affidavit, but does not say whether this is discretionary with the court (Judge Halbert's

[40] 107 F.2d 497 (2d Cir. 1939).

[41] *Id.* at 499.

[42] *Ibid.*

[43] 161 F.2d 453 (2d Cir. 1947).

[44] *Id.* at 456.

[45] United States v. Skeeters, 122 F.Supp. 52, 53, n.l. (S.D. Cal. C.D. 1954).

position) or with the accused;[46] and Rule 12(b)(4) allows resolution of disputed issues of fact on affidavits or in any other manner the court may direct, but does not say whether the court may do this over the objection of the accused, to the deprivation of his right to be confronted with the witnesses against him.[47] Judge Tolin found himself confronted with the unusual situation where the affidavits were very much in conflict; yet, neither party wished to cross-examine the witnesses of the other. Whatever rights existed in this regard were waived. The net result was that Judge Tolin looked on the various affidavits as if the affiants had testified directly on the witness stand, i.e., subject to little or no cross-examination. The court in its discretion is able to judge the credibility of the affiants from the written statements alone. In the *Skeeters* case, Judge Tolin found the affidavit of the defendant the more credible and consistent, and preferable to that of the officer who studiously avoided issues dangerous to the position of the government. This was underscored by the fact that the officer was present in the court room at the time of the hearing and could have been called if it were possible for him to remove the doubts from his affidavit and negate the statements of the defendant.

Since the burden of going forward with the evidence was on the defendant, and since the government did not object to the introduction of the defendant's affidavit, the defendant could agree to the use of the government's affidavits as being substantially the testimony that could have been elicited from the officers had they been called to the stand and subjected to direct and cross-examination. The favorable and expeditious result in *Skeeters* illustrates a weakness in Judge Halbert's outline, with his stern treatment of the use of affidavits in support of the motion to suppress. (See Judge Halbert's Rule 5 and Rule 6.)

In *United States v. Cohen*,[48] the situation was similar to that in the *Skeeters* case. Charged with interstate transmission of wagering information, the defendant moved to suppress evidence "based upon the assertion that evidence was seized by reason of a 'wire tap' and that there was an illegal watch or cover placed on his mail."[49] The defendant supported his motion with the affidavit of his attorney that questions asked by the Internal Revenue Agents showed a knowledge of the contents of the letters and of the telephone conversations, but he did not offer any evidence. The government countered with the affidavits of the United States Attorney and of the Postmaster involved that, respectively, no wire tap was used and only the outside wrappings of the mail was observed.

[46] Rule 47, *supra* note 16.

[47] Rule 12(b) (4), *supra* note 16.

[48] 241 F.Supp. 269 (N.D. Cal. S.D. 1965).

[49] *Id.* at 270.

> Upon the hearing of the motion it was argued by defendant's counsel that oral testimony should be elicited in support of the motion. The government contended that a *prima facie* case had not been made out which would justify a purely exploratory procedure, and that the matter should be disposed of on the record before the court.[50]

Chief Judge Harris agreed with the government. As in *Skeeters,* the motion was decided on the affidavits alone, but here for a much different reason:

> These conclusionary assertions [of the defendant] are patently insufficient to create an issue. In view of the categorical denial by the government and the complete absence of any evidentiary material [referring to defendant's affidavit, not oral testimony] to give support to the defendant's charges, no issue has been presented which requires a further hearing, *or the taking of testimony for the determination of the motion.* [Citations.] [Emphasis supplied.]
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> The defendant has failed to support the motion by a *prima facie* showing of alleged illegal conduct by the government and no issuable fact has been raised. United States v. Warrington, D.C., 17 F.R.D. 25.[51]

As was true in *Vomero* and *Skeeters,* Chief Judge Harris would demand that the affidavit in support of the motion state facts, which if proved are sufficient to warrant granting the motion. (Compare Judge Halbert's Rule 2.) If the accused fails this, he is not even entitled to a hearing on the motion.[52] Moreover, in *Cohen,* the uncontroverted affidavits of the government established the legality of the agents' conduct.

III

Upon a consideration of the foregoing cases which deal with the problems of a motion to suppress evidence and the use of supporting affidavits, it is possible to suggest a suitable procedure.

An affidavit should not be considered competent evidence on which to decide the motion unless the parties stipulate to the facts contained therein. This is especially true with respect to the affidavits of the government, since the accused has the right under the Sixth Amendment to cross-examine the witnesses against him. Thus, the court, over the objection of the accused, cannot compel the submission of affidavits and decide the motion solely thereon. Nor should the affidavit of the accused be considered a waiver of his Fifth Amendment privilege against self-incrimination, especially if the court should compel the submission of an affidavit and then allow cross-examination on its contents.

Rather, the affidavit of the accused informs the court of the factual contentions on which the accused bases his claim for relief. In this way, the trial judge is apprised of the case prior to the hearing on the motion. He is able to determine what factors in the proposed testimony are

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[50] *Ibid.*

[51] *Id.* at 270–271.

[52] The Supreme Court pointed out in Nardone v. United States, 308 U.S. 338, 341–342 (1939), that such preliminary showing is necessary to secure dispatch in criminal cases.

essential to his decision and look for these factors as the circumstances of the search and seizure are developed through the witnesses. Although the court cannot compel the accused to submit an affidavit which will expose him to cross-examination, the court can demand that the accused make a prima facie showing through an affidavit before he is entitled to a factual hearing at which he can present evidence.

The affidavit of the accused should operate as an offer to the government to accept the account of the accused and permit the matter to be argued as a question of law only. Just this one possibility, and the expeditious result which will follow, should be sufficient to justify the suggested use of affidavits in all cases.

If the ultimate burden will be on the government to justify the search and seizure, the affidavit of the accused should be sufficient to shift this burden of proof.[53] The government would proceed with the presentation of its case. If the government has submitted affidavits of its witnesses, then the option will be with the accused whether to accept the affidavits as evidence, i.e., as a stipulation of the facts, or to insist upon his right under the Sixth Amendment to be confronted with the witnesses against him.

Generally, the burden to go forward with the evidence, as well as the ultimate burden of proof, will be on the accused; and in his affidavit in support, he will make an apparent prima facie showing for relief.[54] If the accused makes a prima facie showing, the option is with the government whether to accept the affidavit as evidence or to insist upon the accused proceeding with competent evidence, subject to cross-examination by the government. The usual procedure is for the accused to call the arresting officers and anyone else who may have seen the alleged illegal search and seizure to the witness stand and establish that their testimony is essentially the same as the statement of facts in the affidavit.

[53] It is beyond the scope of this comment to discuss the quantum of proof which either the accused or the government must produce, once the burden of proof is fixed. Chin Kay v. United States, 311 F.2d 317 (9th Cir. 1962); Batten v. United States, 188 F.2d 75 (5th Cir. 1951); Woo Lai Chun v. United States, 274 F.2d 708 (9th Cir. 1960); Cervantes v. United States, 263 F.2d 800 (9th Cir. 1959); United States v. Rivera, 321 F.2d 704 (2d Cir. 1963). See Johnson v. United States, 333 U.S. 10 (1948); Wrightson v. United States, 222 F.2d 556 (D.C. Cir. 1955). Channel v. United States, 285 F.2d 217, 220 (9th Cir. 1960). See Burke v. United States, 328 F.2d 399 (1st Cir. 1964); Villano v. United States, 310 F.2d 680 (10th Cir. 1962); McDonald v. United States, 307 F.2d 272 (10th Cir. 1962); United States v. Roche, 36 F.R.D. 413 (D.Conn. 1965). United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962); Nardone v. United States, 308 U.S. 338, 341 (1939). See United States v. Casanova, 213 F.Supp. 654 (S.D.N.Y. 1963); United States v. Weinberg, 108 F.Supp 567, 569 (D.D.C. 1952). According to Judge Halbert, the moving party *always* has the initial burden to go forward with the evidence. "There is respectable authority for the fact that officers are presumed to do their duty." United States v. Warrington, 17 F.R.D. 25, 29 (N.D. Cal. N.D. 1955).

[54] The motion should be dismissed summarily if there is no prima facie showing for relief.

This would present a prima facie case. The accused may even take the witness stand himself and be subjected to cross-examination by the government.[55] If the government offers no contrary evidence, the motion will be granted.[56] The same conclusion should follow if the accused makes a prima facie showing by his affidavit alone, and the government neither objects nor offers any evidence in opposition. By its silence, the government in effect consents to an agreed statement of facts, the only issue being one of law.

If the government meets the contentions of the accused's affidavit by opposing affidavits, it is possible for the accused to agree to let the motion be decided on the affidavits alone, if he believes that the statements of the government's affiants are substantially what would be the result of direct and cross-examination.[57] This would most probably occur in two situations: first, where the affidavits of the accused and of the government present substantially the same story, and the matter is resolved actually as a question of law only; or second, where the affidavits are in conflict, but the accused believes that his affidavit presents the more credible and consistent version, and that the trial judge can determine this from a reading of the documents alone.

These suggestions, it is submitted, should operate within Judge Halbert's outline of procedure,[58] but with a more liberal use of the affidavit both in support of and in opposition to the motion to suppress.[59] In

[55] It is arguable that the government could use the affidavit of the accused for impeachment purposes. So also, the accused could use the affdavits of the government. However, this point will be of little substance since the motion is decided by the trial judge alone. After having read the affidavits, he is in a position to know when inconsistencies arise. If the accused does waive his privilege against self-incrimination at the hearing on the motion, it is of no effect on his right to invoke this privilege at the trial. See United States v. Miranti, 253 F.2d 135 (2d Cir. 1958).

[56] Reversible error will not be avoided even if the government in its case-in-chief produces testimony which conflicts with the prima facie showing. All disputed questions of fact must be resolved in deciding the motion. Masiello v. United States, 304 F.2d 399 (D.C. Cir. 1962). But see, Carroll v. United States, 267 U.S. 132 (1925), where the latter produced evidence sufficient to justify denial of the motion to suppress was *undisputed,* and so did not constitute prejudicial error.

[57] See United States v. Skeeters, 122 F.Supp. 52 (S.D. Cal. C.D. 1954).

[58] United States v. Warrington, 17 F.R.D. 25, 30 (N.D. Cal. N.D. 1955).

[59] In this Rule 5, Judge Halbert states parenthetically: "An affidavit will always be permitted when either party contends that the proceeding can be determined on a point of law without an issue of fact being involved." United States v. Warrington, *supra* note 58. Query whether or not this might be authority for submission of an affidavit of the accused in *every* case. Few situations, if any, would prevent the accused from seeking government agreement on the facts and submission on a question of law only. An affidavit is the proper vehicle for this. Moreover, there is good authrity that, with consent of both parties, the matter can be submitted on conflicting affidavits alone, contrary to Judge Halbert's holding that a disputed issue of fact *demands* a hearing of oral testimony in all cases. And an affidavit of the accused will certainly satisfy the requirement that he make a prima facie showing.

general, this will lead to a more expeditious and efficient disposition of the motion, without jeopardizing the rights of the accused or of the government. Counsel for both are always free to object to the introduction of the affidavit as evidence, if either feels proper disposition of the motion demands a hearing of oral testimony.

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